THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

Appellate Case No. 2014-001357

Thomas Chad Hilton,
Claimant.....Appellant,

v.

Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier,
Defendants.....Respondents.

RESPONDENTS' REPLY TO APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS

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ARGUMENT/DISCUSSION

I. Appellant has not exhausted his administrative remedies. He will be entitled to an adequate remedy upon a final decision of the Commission, and his appeal must be dismissed.

There has been no final judgment from the Workers' Compensation Commission, and therefore, the Order of the Appellate Panel remanding the claim back to the Single Commissioner is not ordinarily appealable pursuant to S.C. Code Section 1-23-380 and *Bone v. U.S. Food Service*, 744 S.E.2d 552, 404 S.C. 67 (2013). However, Appellant asserts the Order of the Appellate Panel is immediately reviewable by the Court of Appeals pursuant to the portion of S.C. Code Section 1-23-380 which reads as follows: "A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380. Therefore, Appellant asserts that "the dispositive inquiry involves whether deferring review, pending completion of the administrative process, will provide [Appellant] with an adequate remedy." (Appellant's Reply, p. 10)

Appellant cites three bases for alleging he is entitled to expedited review. First, Appellant contends he will be prejudiced during the exhaustion of his administrative remedies, which he alleges entitles him to expedited review. Second, Appellant cites case law which indicates: "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d, 650 (2006); *Storm M.H, ex rel. McSwain v. Charleston Cty. Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492, 497 (2012). Third, Appellant cites case law which indicates: "Another

exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604, 611-612 (Ct.App.2010).

Contrary to Appellant's allegations, Respondents maintain that (1) Appellant is not prejudiced during exhaustion of his administrative remedies, (2) Appellant has not demonstrated that further administrative remedies will be a vain or futile act, and (3) the Commission has not acted outside of its authority. Accordingly, Respondents request dismissal of Appellant's Appeal because Appellant will be provided an adequate remedy upon exhaustion of his administrative remedies.

A. Appellant is not prejudiced by the appeals process.

Appellant contends he is being prejudiced because he will incur increased litigation expenses. At the outset, it must be pointed out that ***Appellant continues to receive weekly benefits for temporary total disability related to his alleged work injury***. Not only is Appellant not being prejudiced; he is actually being paid while he prolongs the appeals process. Any prejudice to the parties during the course of the workers' compensation proceedings will be against Respondents, as they continue to pay weekly benefits for a fraudulent claim, and Appellant's alleged *prejudice*, in the form of increased litigation expenses, is no different than any other workers' compensation claimant whose claim is being appealed.

B. Appellant has not demonstrated that pursuit of administrative remedies will be a futile or vain act.

"Futility ... must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Law*, 368 S.C at 438; *citing Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990). The Appellate Panel of the Commission has

remanded the claim back to the Single Commissioner for a full evidentiary hearing. On remand, the Single Commissioner may very well find for Appellant, and the Commission has certainly not taken "a hard and fast position that makes an adverse ruling a certainty," which is the standard for proving that the administrative remedies will be futile.

Similarly, "[f]or urgency to constitute an exception to the requirement that a party exhaust her administrative remedies, she must show that the injury threatened is irreparable." *See* 2 Am.Jur.2d *Administrative Law* § 478 (2012). Appellant has certainly not proven that "the injury threatened is irreparable," as Appellant remains entitled to a full evidentiary hearing before the Single Commissioner, an appeal to the Appellate Panel of the Commission, and an eventual appeal to this Court and to the Supreme Court.

C. The Commission has not acted outside of its authority.

Appellant makes the blanket statement that the Appellate Panel committed errors which "have irreparably tainted this litigation, to the extent that all further action before the commission will be legally meaningless." (Appellant's Reply, p. 13) Appellant argues the Panel committed errors of law because it addressed issues which were not specifically raised in Respondents' Form 30, Request for Commission Review. Specifically, Appellant asserts the following issues were improperly addressed by the Appellate Panel: (1) Appellant's competency to testify, (2) Appellant's need for a Guardian ad Litem, and (3) an additional neurological evaluation.

Regulation 67-216(A) states the following: "When a minor or incompetent person is a party, a Guardian ad Litem ***shall*** represent the minor or mentally incompetent." (emphasis added) Regulation 67-216(E) further states: "The Commission ***shall not*** hold a hearing for final determination of benefits until proof of appointment of

a Guardian ad Litem is filed with the Commission." (emphasis added) Appellant submitted into evidence numerous reports and questionnaires from purported "experts," all of whom opined that Appellant has permanent cognitive defects which impair his ability to conduct his daily activities and recall personal history. With the degree of cognitive defects alleged by Appellant, the Appellate Panel found that a determination as to Appellant's competency to testify is necessary prior to holding a full hearing, as a Guardian ad Litem would be ***required*** if Appellant is found to be mentally incompetent. Therefore, as a condition precedent to holding a full hearing, the Appellate Panel determined that an additional neurological evaluation is required, followed by a determination of whether Appellant is competent to testify at a hearing, or whether he requires a Guardian ad Litem, pursuant to Regulation 67-216. Regardless of whether this determination was raised by the parties, a full hearing is not allowed until a determination is made with regard to Appellant's mental competency and need for a Guardian ad Litem.

Even assuming Appellant was competent to testify and did not require a Guardian ad Litem, these issues *were* raised by Respondents in the appeal to the Full Commission. The heart of this claim centers on Appellant's credibility and testimony. Respondents contend Appellant's claim is wrought with fraudulent misrepresentations and deceit, and Appellant's simple and minor abscess healed long ago, with no residual problems. Appellant does not dispute that he has made multiple inaccurate statements during his claim, but Appellant argues that his misrepresentations are the result of a previous brain injury and cognitive defect, rather than any intentional attempt to lie. The Single Commissioner found that Appellant's inaccurate statements throughout the claim were the result of his cognitive dysfunction, rather than a volitional attempt to mislead.

Respondents appealed this determination in the Form 30, Request for Commission Review, specifically appealing the Single Commissioner's failure to find that Appellant lacks credibility and that the claim is fraudulent, appealing the Commissioner's reliance on Appellant's purported experts, and appealing the findings that Appellant was entitled to ongoing and additional benefits and medical treatment.

It is elementary that the Appellate Panel hears appeals from the Single Commissioner and may re-weigh the evidence and make its own findings and conclusions:

> The Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct.App.2006). Pursuant to S.C.Code Ann. § 42-17-50 (Supp.2007), the Commission shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *Lowe v. Am-Can Transp. Servs. Inc.*, 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct.App.1984); see also *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967) (holding although it is logical for the Commission to give weight to the Single Commissioner's opinion, the Commission may disagree with his findings based on the credibility of witnesses).

Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (S.C.App. 2009).

In the instant case, the Appellate Panel reviewed the evidence and testimony, and the Panel determined that the *issues* of the claim could not properly be decided before (1) a determination of whether Appellant is competent to testify, (2) a determination of whether Appellant requires a Guardian ad Litem, and (3) an additional neurological evaluation was performed. The Panel has not raised or addressed any additional or unpreserved issues; it has simply remanded the claim so that the *issues* may be adequately addressed.

Petitioner also argues the Appellate Panel Order fails to make specific findings of fact and conclusions of law, and this lack of specificity requires immediate review by the Court of Appeals. Section 1-23-350, titled "Final decision or order in contested case," specifically requires findings of fact and conclusions of law be expressly stated when there is a "final decision" of an administrative agency. In this case, there is clearly no final decision or judgment being issued, as the Appellate Panel vacated and remanded the claim back to the Single Commissioner for further proceedings. Similarly, Section 42-17-40 indicates that the "award" shall include findings of fact and conclusions of law, and in this case, there is not an award being issued, as the claim is being remanded for further proceedings.

Appellant argues that Respondents' position "ignores the import of ... numerous appellate court rulings." (Appellant's Reply, p. 11) However, Appellant fails to cite a single case where the order being appealed was an intermediate or preliminary action. Indeed, every case cited by Appellant deals with an appeal from a *final judgment or decision* of an administrative tribunal, and those cases are immediately distinguishable to the facts of this claim. The Commission has not acted outside its authority, and Appellant is not entitled to review by the Court of Appeals until he has exhausted his administrative remedies at the Workers' Compensation Commission level, pursuant to Section 1-23-280 and the arguments above.

CONCLUSION

For the reasons set forth above, the May 21, 2014, Decision and Order of the Appellate Panel is not immediately appealable to the Court of Appeals, and Respondents respectfully request the appeal be dismissed, with prejudice.

Respectfully submitted,

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August 12, 2014

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In the Court of Appeals

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Susan S. Barden, Commissioner
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PROOF OF SERVICE

I certify that I have served the Respondents' Reply to Appellant's Return to Respondents' Motion to Dismiss on Thomas Chad Hilton by depositing a copy in the United States Mail, postage prepaid, on August 12, 2014, addressed to his attorney of record, Andrew N. Safran, Esquire, Andrew N. Safran, LLC, Post Office Box 12089, Columbia, South Carolina 29211.

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August 12, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Thomas Hilton vs. Flakeboard America Limited
Appellate Case No. 2014-001357
WCC File No.: 1111934 DOI: 8/17/2011
Carrier: Liberty Mutual - Claim No.: WC555-A26831
WJC&B File No.: 0010.03789

Dear Ms. Kitchings:

Enclosed for filing are an original and six copies of Respondents' Reply to Appellant's Return to Respondents' Motion to Dismiss in the above-referenced matter. Also enclosed is a Proof of Service of the Reply.

By copy of this letter and as indicated by the Proof of Service, we now serve the above-referenced documents on Appellant's Counsel.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

L. Brenn Watson

Enclosure

cc: Andrew N. Safran, Esquire
South Carolina Workers' Compensation Judicial Department

ccc

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